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Nos. 3, 5

In the Supreme Court of the United States

OCTOBER TERM, 1948

ESTATE OF SIDNEY M. SCHEUER, DECEASED, ET AL.,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ESTATE OF FRANCOIS L. CHURCH, DECEASED,
EDWARD E. BLACK, EXECUTOR

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SEVENTH AND THIRD CIRCUITS, RESPECTIVELY

BRIEF FOR THE COMMISSIONER OF INTERNAL REVENUE ON REARGUMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 3

ESTATE OF SIDNEY M. SPIEGEL, DECEASED, ET AL., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

No. 5

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ESTATE OF FRANCOIS L. CHURCH, DECEASED, EDWARD E. BLACK, EXECUTOR

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SEVENTH AND THIRD CIRCUITS, RESPECTIVELY

BRIEF FOR THE COMMISSIONER OF INTERNAL REVENUE ON REARGUMENT

QUESTIONS ASKED BY THE COURT

These two cases were argued together and submitted to this Court on October 24, 1947. On

June 21, 1948, the cases were ordered restored to the docket and were assigned for reargument. Counsel were requested to discuss particularly the following questions in so far as they are relevant to the respective cases:

1. Assuming that, under the applicable state law, there was no possibility of reverter and no interest of any other kind retained or arising in favor of the settlor or his estate under the transfer made in trust, *inter vivos,* did Section 811 (c) of the Internal Revenue Code require that the value of the corpus of the trust be included in the settlor's gross estate for federal estate tax purposes? That is, did Section 811 (c) require the inclusion in the gross estate of the settlor of the value of the corpus of a trust, created *inter vivos,* merely because the settlor had provided in it that, upon his death, the trust should terminate and the corpus be distributed to designated beneficiaries then surviving?

2. Assuming that, under the applicable state law, there arose, by operation of law, a possible reverter in favor of the settlor's estate, did Section 811 (c) require that the value of the corpus, in view of the record in the case, be included in the settlor's gross estate for federal estate tax purposes?

3. Did Section 811 (c) of the Internal Revenue Code, in 1939, require the inclusion in the settlor's gross estate of the value of the corpus of a trust

because the settlor, by its terms, had, in 1924, reserved to himself a right to the income of the trust until his death, the reservation thus being made before the March 3, 1931, amendment of that section?

4. Were the joint congressional resolution of 1931 (46 Stat. 1516–1517), and subsequent related estate tax statutes, intended to be a repudiation of this Court's *May* v. *Heiner* (281 U. S. 238) interpretation of the estate-tax statutes?

5. Did the *May* v. *Heiner* estate-tax interpretation survive the congressional resolution and this Court's holding and opinion in *Helvering* v. *Hallock* (309 U. S. 106)?

6. Under Section 811 (c) is the "possession or enjoyment" of the corpus of an *inter vivos* trust "intended to take effect * * * at or after" the settlor's death, where he names himself as cotrustee with the broad control and administrative powers over the corpus and income here vested, and where the corpus is withheld from the beneficiaries until the settlor's death?

7. In the light of this Court's opinion in *Helvering* v. *Hallock* does the *Hassett* v. *Welch* (303 U. S. 303) interpretation of the 1931 congressional resolution have controlling relevance in determining whether the estate tax shall be applied to the Church properties transferred to beneficiaries under a trust created before 1931 but in which Church retained the net income from the trust properties during his life?

8. Assuming that under the "refined technicalities of the law of property" the "possession or enjoyment" of the trust properties here be deemed to have passed to the beneficiaries when the trust was created, are the transfers so much "akin to testamentary dispositions" as to make them subject to the estate tax statutes? (See *Helvering* v. *Hallock*, p. 112.)

9. What is the effect of the rulings of *Helvering* v. *Clifford* (309 U. S. 331) upon these trusts?

ARGUMENT

The questions asked by the Court indicate a rather fundamental inquiry into the operation of the estate tax statute generally. The inquiry is precipitated, we believe, by the existence of certain basic decisions which are not wholly consistent with one another, and which render it difficult to reconcile some of the results with the underlying purpose and language of the statute. We had not originally intended to raise such fundamental issues, since we believe that our position is supported upon narrower grounds, namely, that the present cases are explicitly covered by the provisions of a valid treasury regulation which undertakes to accommodate itself to the various decisions of this Court. (See our main brief in *Spiegel* case, pp. 20–22.) However, in view of the nature of the questions now put by the Court, we feel that a more fundamental analysis is appropriate, and since the answers to

a number of the questions have their roots in the same underlying materials, we think it will be helpful first to examine certain basic considerations.

The first federal estate tax law was enacted as part of the Revenue Act of 1916 (c. 463, 39 Stat. 756, Secs. 200–212). It undertook to tax as part of the decedent's estate not only property owned by the decedent at the time of his death, but also certain *inter vivos* transfers that were intended as substitutes for testamentary dispositions. Included among the latter were transfers made "in contemplation of" death, as well as transfers "intended to take effect in possession or enjoyment at or after" death. Section 202 (b), Revenue Act of 1916. These provisions were carried forward in the various reenactments of the estate tax law,[1] and the language quoted appears in Section 811 (c) of the Internal Revenue Code, involved herein.

The clause "intended to take effect in possession or enjoyment * * *" was not a novel one. It had appeared in substantially identical form in the death tax statutes of at least forty

[1] Section 402 (c) of the Revenue Act of 1918, c. 18, 40 Stat. 1057; Section 402 (c) of the Revenue Act of 1921, c. 136, 42 Stat. 278; Section 302 (c) of the Revenue Act of 1924, c. 234, 43 Stat. 253; Section 302 (c) of the Revenue Act of 1926, c. 27, 44 Stat. 9. The last basic estate tax statute was enacted in the Revenue Act of 1926, and, as amended, it was incorporated in the Internal Revenue Code.

States over a period of nearly a century, as well as in the early federal death tax legislation enacted during the Civil War and the Spanish American War.[2] The language used was non-technical, and was obviously not intended to deal with the "vesting" of rights or title. The statute plainly contemplated transactions in which the actual possession or enjoyment of the property in the hands of the donee was to be postponed at least until the donor's death, irrespective of when the donee's rights became established. It was not particularly significant whether the donee's rights vested *in interest* at once; what was significant was whether the transfer was to take effect *in possession or enjoyment* at or after the donor's death.

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[2] The history of this clause is traced in the Government's brief in *Hassett* v. *Welch*, No. 375, 1937 Term, p. 20 *et seq.* The first death tax statute passed by a state in this country, the Pennsylvania Act of April 7, 1826 (Laws 1826, c. 72, Sec. 1) dealt with property "* * * transferred by deed, grant, bargain or sale, made or *intended to take effect, in possession or enjoyment after the death of the grantor* or bargainor * * *." [Italics supplied.] The clause thereafter appeared in the early federal death tax legislation (Section 111 of the Act of July 1, 1862, c. 119, 12 Stat. 432, 485; Section 124 of the Act of June 30, 1864, c. 173, 13 Stat. 223, 285; Section 29 of the Act of June 13, 1898, c. 448, 30 Stat. 448, 464), as well as in the death tax statutes of thirty-nine other States prior to the adoption of the first Federal estate tax law in 1916. See also note, *Origin of the Phrase "Intended to Take Effect in Possession or Enjoyment at or After ... Death" (Section 811 (c), Internal Revenue Code)*, 56 Yale L. J. 176.

Such was the clear understanding of that provision, as disclosed by decisions of the courts prior to the adoption of the first federal estate tax statute in 1916,[3] as well as by the regulations promulgated thereafter by the Secretary of the Treasury. For example, Article 24 of Regulations 37 (1919 and 1921 eds.), after providing that a transfer is taxable merely because the grantor reserves the income to himself for life, made it plain that the transfer might also be taxable even though the decedent had reserved no interest whatever to himself; the regulations specifically stated:

> A gift of the principal of a trust fund which takes effect at or after the decedent's death is taxable, although the income during the decedent's life is payable to some one other than himself. Example: The decedent transfers property to his son, the latter agreeing to pay the income to his mother during the decedent's life. The transfer to the son is taxable.

Similar provisions appeared also in Article 20, Regulations 63 (1922 ed.); Article 18, Regulations 68 (1924 ed.); Article 18, Regulations 70 (1926

[3] For a collection of cases in the state courts, see Government's brief in *Hassett* v. *Welch*, No. 375, 1937 Term, p. 20, *et seq.* The "possession or enjoyment" clause in the federal act of 1898 was involved in *Vanderbilt* v. *Eidman*, 196 U. S. 480, where the Court pointed out (p. 493) that Congress made "the liability for taxation depend, not upon the mere vesting in a technical sense of title to the gift, but upon the actual possession or enjoyment thereof" in the transferee.

and 1929 eds.). And only several years ago, this Court pointed out in *Commissioner* v. *Estate of Holmes,* 326 U. S. 480, 486:

> More than once recently we have emphasized that "enjoyment" and "enjoy," as used in these and similar statutes, are not terms of art, but connote substantial present economic benefit rather than technical vesting of title or estates. Cf. *United States* v. *Pelzer,* 312 U. S. 399, 403; *Fondren* v. *Commissioner,* 324 U. S. 18, 20; *Commissioner* v. *Disston,* 325 U. S. 442.

Thus, if the plain language of the statute were to be given effect, it would include all transfers in which the actual possession or enjoyment of the property by the donees could not take effect until at or after the donor's death, regardless of whether the donor reserved any interest to himself, and regardless of whether the donees' rights vested in interest at once. Moreover, such a literal reading of the statute would be fully in keeping with its purpose, namely, to reach *inter vivos* transfers that were substitutes for testamentary dispositions. The companion clause dealing with transfers "in contemplation of death" has never been understood to impose the requirement either that the decedent retain an interest in the transferred property or that the transferees' rights be defeasible prior to the decedent's death. Both types of transfers were

properly regarded by Congress as substitutes for testamentary dispositions; and both were therefore included in the measure of the gross estate. See *United States* v. *Wells*, 283 U. S. 102, 116–117.

From the date of the enactment of the Revenue Act of 1916 until the present day, the "intended to take effect in possession or enjoyment" clause has been coupled in the same subsection with the "contemplation of death" clause. As a matter of syntax, both modify "transfer". Both clauses have a unity of purpose, namely, to reach substitutes for testamentary dispositions.[3a] If the transfer be motivated by the thought of death, it is treated as a substitute for a testamentary disposition, and it is included in the measure of the gross estate though the time of the decedent's death has no relation to the actual receipt of the property by the transferee. Since Congress, in the contemplation of death provision, was not concerned with the passing of property from the decedent at the date of his death, it may readily

[3a] In *United States* v. *Wells*, 283 U. S. 102, 116–117, Mr. Chief Justice Hughes declared:

"The statutory description embraces gifts *inter vivos*, despite the fact that they are fully executed, are irrevocable and indefeasible. The quality which brings the transfer within the statute is indicated by the context and manifest purpose. Transfers in contemplation of death are included within the same category, for the purpose of taxation, with transfers intended to take effect at or after the death of the transferor. The dominant purpose is to reach substitutes for testamentary dispositions and thus to prevent the evasion of the estate tax."

be concluded that Congress was likewise not concerned with the passing of property from the decedent at the date of his death when it grouped within the same category transfers "intended to take effect in possession or enjoyment" at or after the decedent's death. The category is one of substitutes for testamentary dispositions. A transfer in contemplation of death is treated as a substitute for a testamentary disposition because the thought of death motivates the transfer. A transfer intended to take effect in possession or enjoyment in the transferee at or after the decedent's death is treated as a substitute for a testamentary disposition by reason of the nature of the transfer. Thus a gift from a father to his son of a bank account, thereafter possessed and enjoyed by the son during the father's lifetime, may be classed as a transfer in contemplation of death but search must be made for the father's motive in making the transfer. How much clearer a case for a substitute for a testamentary disposition, however, is presented where the father transfers a bank book to a third party to be delivered to the son upon the father's death. Search for the father's motive in such a case would be needless. The very nature of such a transfer renders it a substitute for a testamentary disposition, and it should therefore be classified as a transfer "intended to take effect in posses-

sion or enjoyment at or after" death, without any inquiry into whether the decedent retained something which "passed" at his death.[4]

However, the efforts of the Treasury Department to give the "possession or enjoyment" clause its proper scope met with failure in this Court in several important early cases involving this clause in the federal estate tax statute. In *Shukert* v. *Allen*, 273 U. S. 545, the decedent, at fifty-six years of age, had transferred securities in trust to accumulate the income for thirty years, and at the end of that period to divide the principal and accumulated income among his three named children; he died shortly thereafter. Here was a case in which the transfer was plainly intended to take effect in possession or enjoyment

[4] Further confirmation of the congressional purpose not to confine the statute to "transfers" from the decedent at his death is found in the provisions requiring the inclusion of interests held jointly by the decedent and any other person. Though the right of the other joint tenant may have vested at the time of the creation of the tenancy, and though such tenant could sever the tenancy at any time and receive at least one-half of the property prior to the other's death, it has been established that all of the property is to be included in the decedent's gross estate. *United States* v. *Jacobs*, 306 U. S. 363. Cf. *Tyler* v. *United States*, 281 U. S. 497; *Fernandez* v. *Wiener*, 326 U. S. 340. Although it may fairly be said that at least one-half of such property does not pass at the decedent's death, all of it is nevertheless included in the measure of the gross estate since the arrangement has been treated by Congress as a substitute for a testamentary disposition.

at or after the grantor's death.* Yet this Court reversed both lower courts and ruled that the transfer was not within the statute, calling attention to the fact that the transfer was immediate "leaving no interest remaining in the testator" (p. 547) and that "the interest of the children respectively was vested as soon as the instrument was executed, even though it might have been divested as to any one of them * * * if he died before the termination of the trust" (p. 547).

Again, in *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, it was held that property transferred in trust was not covered by the "possession or enjoyment" clause, where the life interest was terminable five years after the death of the settlor or on the death of the life beneficiary should she survive that date, with a remainder over. Here, too, it was plain that actual possession or enjoyment of the property was postponed until after the settlor's death; yet the Court held that since the settlor had "parted both with the possession and his entire beneficial interest in the property when the trust was created" (p. 347), the transfer was not taxable. The statute as construed by the Government had been attacked on

*In ruling in favor of the Government, the District Court had concluded that the donor had postponed enjoyment beyond any time that he expected to live himself. *Shukert* v. *Allen*, 300 Fed. 754, 756 (D. Nebraska), affirmed, 6 F. 2d 551 (C. C. A. 8).

constitutional grounds by the taxpayer, and it seems probable that constitutional doubts played some part in the Court's conclusion not to apply the statute in accordance with its literal meaning (cf. pp. 348–349), doubts which today appear to be wholly without substance. Cf. *Fernandez* v. *Wiener*, 326 U. S. 340, 355; *Fidelity Co.* v. *Rothensies*, 324 U. S. 108; *Central Hanover Bank Co.* v. *Kelly*, 319 U. S. 94, 97–98; *Helvering* v *Hallock*, 309 U. S. 106; *Helvering* v. *Bullard*, 303 U. S. 297; *Helvering* v. *City Bank Co.*, 296 U. S. 85.

Not long thereafter, in *May* v. *Heiner*, 281 U. S. 238, the Court held that a transfer was not within the statute where the income was to be paid to the grantor's husband during his life and after his death to the grantor, with remainders to their children upon termination of the life estates. The opinion stressed the fact that at the grantor's death "no interest in the property * * * passed from her to the living; title thereto had been definitely fixed by the trust deed" (p. 243). And within less than a year, it was held in three cases, decided in identical *per curiam* opinions upon the authority of *May* v. *Heiner*, that a transfer accompanied by the retention of a life estate was not comprehended within the meaning of the "possession or enjoyment" clause. *Burnet* v. *Northern Trust Co.*, 283 U. S. 782; *Morsman* v. *Burnet*, 283 U. S. 783; *McCormick* v. *Burnet*, 283 U. S. 784. The cases were decided on March

2, 1931, and within one day a joint resolution was introduced and passed by both houses of Congress (c. 454, 46 Stat. 1516) to overcome the effect of those decisions. In discussing the matter, Senator Smoot, Chairman of the Finance Committee, declared (Cong. Rec., Vol. 74, Part 7, p. 7078):

> The decision of the Supreme Court came almost like a bombshell, because nobody ever anticipated such a decision.

He voiced the common understanding that prior to these decisions the statute had generally been regarded as covering such transfers, and stated (ibid.):

> The Treasury Department had so construed the statute since the first Federal estate tax law in 1916 and its regulations so provide.

It is true that since the immediate purpose of the joint resolution was to overcome the effect of these decisions, it dealt merely with transfers in which the decedent had retained some life interest. Yet, in rejecting those decisions, it seems persuasive that Congress was disapproving the general approach to the problem, and that it did not regard the "possession or enjoyment" clause as inoperative merely because the survivors' rights had become indefeasibly established at the time of the transfer.

However, the Court continued to impose the general requirement that the decedent must retain

rights which pass at his death to the survivors. And in *Klein* v. *United States*, 283 U. S. 231, it was held that the grantor's right to reacquire full dominion over the property in the event he should outlive the life tenant was sufficient to bring the transfer within the clause. Thereupon, litigation arose as to whether the grantor had retained a sufficient interest where his right to reacquire the property, although substantially equivalent to the right in the *Klein* case, was classifiable under technical property law as a "contingent" interest or a "possibility of reverter". And the holding that such a contingent interest was not sufficient (*Helvering* v. *St. Louis Trust Co.*, 296 U. S. 39; *Becker* v. *St. Louis Trust Co.*, 296 U. S. 48) was subsequently overruled in *Helvering* v. *Hallock*, 309 U. S. 106. Moreover, the Court later made it clear that the rule of the *Hallock* case applied even where the decedent's retained interest was "remote". *Fidelity Co.* v. *Rothensies*, 324 U. S. 108, 111–112; *Commissioner* v. *Estate of Field*, 324 U. S. 113, 116; *Goldstone* v. *United States*, 325 U. S. 687. But, at no time has the Court expressly overruled such cases as *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, which require that the decedent retain some interest in the property.

Accordingly, although believing that such cases were wrongly decided in this respect, the Treasury has nevertheless conscientiously endeavored

to accommodate its practice to all of the decisions. Although it was felt that a transfer in which the donees' actual possession or enjoyment could not take effect prior to the decedent's death was covered by the statute, the Treasury nevertheless has adopted regulations in which (see Appendix, *infra*, p. 64) it is provided:

> SEC. 81.17 [as amended by T. D. 5512, 1946–1 Cum. Bull. 264]. *Transfers intended to take effect at or after the decedent's death.*—A transfer of an interest in property by the decedent during his life (other than a *bona fide* sale for an adequate and full consideration in money or money's worth) is "intended to take effect in possession or enjoyment at or after his death," and hence the value of such property interest is includible in his gross estate, if—
>
> (1) possession or enjoyment of the transferred interest can be obtained only by beneficiaries who must survive the decedent, and
>
> (2) the decedent or his estate possesses any right or interest in the property (whether arising by the express terms of the instrument of transfer or otherwise). [Regulations 105]

The second condition is not required by the language of the statute, and was inserted merely because such cases as *Reinecke* v. *Northern Trust Co.* have not been explicitly overruled. But assuming that the second condition must be met,

the regulations make it clear that the statute applies whether the retained interest arises "by the express terms of the instrument of transfer *or otherwise*" [italics supplied], and among the numerous examples given in the regulations, Example (7) covers the instant cases precisely:

> *Example* (7). The decedent transferred property in trust to pay the income to his son during decedent's life, and at decedent's death to pay the principal to his son if living; if not, to his son's issue surviving both the son and the decedent. In this case, the property may revert to the estate of the decedent if neither his son nor his son's issue survives him. Moreover, neither the son nor the latter's issue can obtain possession or enjoyment of the property unless they survive the decedent. The entire value of the estate in remainder is, therefore, includible in the latter's gross estate.

At the time the present cases were first submitted to the Court on brief and oral argument last term, it was assumed by the Government that both conditions had to be met, and the Government contended that the decedent's right, under state law, to reacquire the property in the event that he should outlive the beneficiaries was sufficient to fulfill the second condition. We now renew that contention, and suggest that a decision along this line would dispose of the litigation upon narrow grounds without inquiry into

the troublesome question whether the *Northern Trust Co.* case or *May* v. *Heiner* should be expressly overruled. However, if the Court is inclined to examine the problem along more fundamental lines, we think that the transfers should be held taxable regardless of whether the decedents retained any interest. In both cases, none of the beneficiaries could come into possession or enjoyment of the corpora of the trusts until at or after the death of the respective grantor. Indeed, even the rights (as distinguished from possession or enjoyment) of those beneficiaries in the property did not become indefeasibly vested until at or after the decedent's death, for their rights were in fact contingent upon surviving the decedent. In every real sense, these transfers were therefore intended to take effect in possession or enjoyment at or after the grantor's death.

Question 1

Assuming that, under the applicable state law, there was no possibility of reverter and no interest of any other kind retained or arising in favor of the settlor or his estate under the transfer made in trust, inter vivos, did Section 811 (c) of the Internal Revenue Code require that the value of the corpus of the trust be included in the settlor's gross estate for federal estate tax purposes? That is, did Section 811 (c) require the inclusion in the gross estate of the settlor of the value of the corpus of a trust,

created inter vivos, merely because the settlor had provided in it that, upon his death, the trust should terminate and the corpus be distributed to designated beneficiaries then surviving?

If the plain language of Section 811 (c) is to be given effect, and if the purpose of the provision (to reach substitutes for testamentary dispositions) is not to be frustrated, the answer to Question 1 is "Yes." In both the *Spiegel* and *Church* cases, the grantor had so tied up his property during his life time that no beneficiary could obtain possession or enjoyment of the corpus until at or after the grantor's death. Indeed, even the *interests* of the beneficiaries in the corpus could not become indefeasibly vested until at or after the grantor's death, for no one could take who did not survive the grantor. The decedent made his own death the indispensable event upon which the actual possession and enjoyment as well as the rights of the ultimate takers depended. In every real sense the grantor had utilized the trust device as a substitute for a testamentary disposition. Literally, the transfer in each case was intended "to take effect in possession or enjoyment at or after" the grantor's death; and it was the purpose of the statute to reach such transfers, regardless of whether the grantor had retained any interest for himself. Such was the understanding of the clause when the first federal estate law was enacted in 1916, as reflected in treasury regu-

lations that were in effect until 1930,[6] during several reenactments of the statute.[7]

On the other hand, if *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, is to be followed, the answer to Question 1 is "No". As shown by the discussion above, pp. 5–18, we think that case was erroneously decided in this respect, and is inconsistent in principle with such decisions as *Helvering* v. *Hallock*, 309 U. S. 106; *Fidelity Co.* v. *Rothensies*, 324 U. S. 108; and *Goldstone* v. *United States*, 325 U. S. 687. However, since the *Northern Trust Co.* case has never been expressly overruled, the Treasury has attempted to harmonize its practice to take that decision into account. And its present regulations spell out the double requirement: (1) that possession or enjoyment can be obtained only by beneficiaries who must survive the decedent; and (2) that the decedent or his estate have some right or interest in the transferred property (whether expressly retained or otherwise). Since we think that the tax was correctly imposed in each case under the regulation (which accepts the *Northern Trust Co.* decision), it is not absolutely necessary to consider whether the *Northern Trust Co.* case was correctly decided. Nevertheless, the acceptance of

[6] The pertinent provisions of the regulations (*supra*, p. 7), were eliminated in 1930 by T. D. 4285, IX–1 Cum. Bull. 356, presumably in response to the decision in *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339 (1929).

[7] See footnote 1, *supra*, p. 5.

the *Northern Trust Co.* case, on the one hand, and the *Hallock* and *Fidelity Co.* cases, on the other hand, as constituting a consistent body of law leads to making liability turn upon rather fine considerations. Accordingly, if the Court were disposed to state that the *Northern Trust* case be expressly overruled, there would result a more consistent pattern among the decisions, in consonance with the language and purpose of the statute.[8]

In addition to what has been said above regarding the incompatibility of the *Northern Trust* case with more recent decisions of this Court, the following may be pertinent. There has been much controversy as to whether *Helvering* v. *Hallock*, 309 U. S. 106, overruled *Reinecke* v. *Northern Trust Co.* or *May* v. *Heiner*. The Board of Tax Appeals held in 1941 in *Estate of Hughes* v. *Commissioner*, 44 B. T. A. 1196, that the effect of the *Hallock* case was to overrule *May* v. *Heiner*.[9] However, in *Estate of Bradley* v. *Com-*

[8] It should be noted that the express disapproval of the *Northern Trust* would not operate unfairly to the taxpayers in these cases, since the trusts were created in 1920 (Spiegel, R. 126) and 1924 (Church, R. 7), respectively, when there were outstanding regulations making it clear that a retained interest was not indispensable to taxability, (see p. 7, *supra*).

[9] See *Estate of Madison*, 26 Cal. 2d 453, 458–461, 159 P. 2d 630, for a thoughtful analysis of the trend of the decisions in this Court on this question. See also *In re Patterson's Estate*, 127 N. Y. S. 284, affirmed, 146 App. Div. 286, 130 N. Y. S. 970, affirmed, 204 N. Y. 677, 98 N. E. 1109; *Blodgett* v. *Union & New Haven Trust Co.*, 97 Conn. 405, 116 Atl. 908.

missioner, 1 T. C. 518, affirmed *sub nom. Helvering* v. *Proctor*, 140 F. 2d 87 (C. C. A. 2), the Tax Court receded from that view. Certainly, the *Hallock* case did not explicitly overrule either *Reinecke* v. *Northern Trust Co.* or *May* v. *Heiner*. But we do think that it is extremely difficult to reconcile either the approach or the results in these cases with the decision in the *Hallock* case.

The decision in *May* v. *Heiner* was based largely upon *Reinecke* v. *Northern Trust Co.*, from which it quoted at length, and concluded (281 U. S. at 243):

> At the death of Mrs. May no interest in the property held under the trust deed passed from her to the living; *title* thereto had been definitely fixed by the trust deed. The interest therein which she possessed immediately prior to her death was obliterated by that event. [Italics supplied.]

The decisions of this Court in the *St. Louis Trust Co.* cases were likewise based upon the reasoning in the *Northern Trust* case. After quoting from the opinion in the *Northern Trust* case, the Court in *Helvering* v. *St. Louis Trust Co.*, stated (296 U. S. at 43):

> If, therefore, no interest in the property involved in a given case pass "from the possession, enjoyment or control of the donor at his death," there is no interest with respect to which the decedent has created a trust intended to take effect in possession or enjoyment at or after his

death. The grantor here, by the trust instrument, left in himself no power to resume ownership, possession or enjoyment except upon a contingency in the nature of a condition subsequent, the occurrence of which was entirely fortuitous so far as any control, design or volition on his part was concerned. After the execution of the trust he held no right in the trust estate which in any sense was the subject of testamentary disposition. His death passed no interest to any of the beneficiaries of the trust, and enlarged none beyond what was conveyed by the indenture. His death simply put an end to what, at best, was a mere possibility of a reverter by extinguishing it—that is to say, by converting what was merely possible into an utter impossibility.

It would thus seem clear that *Reinecke* v. *Northern Trust Co.*, *May* v. *Heiner* and the *St. Louis Trust Company* cases were all placed on a common ground, namely, that where title has been definitely fixed by the *inter vivos* instrument, where no interest passes to the living from the decedent at his death but death merely "obliterates" any interest theretofore possessed by the decedent, the *inter vivos* transfer does not come within the scope of the "intended to take effect in possession or enjoyment" provision. From these cases developed the thought that the decedent or his estate must possess some right or interest in the property at the time of his death

as a condition to the operation of the statute upon *inter vivos* transfers.

In expressly overruling the *St. Louis Trust Company* cases, this Court in *Helvering* v. *Hallock* not only struck down the decisions as they pertained to the particular facts in the *St. Louis Trust Company* cases but at the same time, we think, rejected as unsound the basis on which the *St. Louis Trust Company* cases were rested. That basis being fundamentally the same as the basis of *Reinecke* v. *Northern Trust Co.* and *May* v. *Heiner*, it might well be concluded that the latter cases should fall with the *St. Louis Trust Company* cases.

In *Fidelity Co.* v. *Rothensies*, 324 U. S. 108; *Commissioner* v. *Estate of Field*, 324 U. S. 113; and *Goldstone* v. *United States*, 325 U. S. 687, the decedents likewise possessed until their deaths possibilities of regaining the property or rights in the property, but such possibilities were "remote". In the *Fidelity* case this Court stated that the taxable gross estate must include those property interests the ultimate possession or enjoyment of which is held in suspense until the moment of the grantor's death or thereafter, and made it clear that the remoteness of the decedent's interest or its actuarial value make no difference in the determination of the taxable character of the transfer.

The retention by the settlor of a reversionary interest is, however, only one method of holding

in suspense until the moment of the settlor's death the ultimate possession or enjoyment of property. It is not the only method. If the death of the decedent is the event which determines not only the time when the ultimate taker will enter into actual possession or enjoyment but also determines who that taker will be, the ultimate possession or enjoyment of the property has been suspended until the decedent's death whether or not the decedent possessed a possibility of regaining the property during his lifetime. In the *Spiegel* case, even if it be assumed that the decedent possessed no possibility of reverter and no interest of any other kind under the transfer in trust, nevertheless his death was the intended event which would determine (1) the time when the actual possession and enjoyment of the remainder interest would take effect and (2) who the ultimate takers would be. In the *Church* case, the decedent retained during his lifetime the income from the property, that is, the actual possession and enjoyment of the property, and hence the actual possession and enjoyment of the property could not possibly take effect in the remainderman until his death; in addition since survivorship of the decedent was necessary for any remainderman to take, the decedent's death was the event which determined both the time of actual possession and enjoyment and also who the ultimate takers would be. A rule which makes the test of taxability turn upon the retention by

the decedent until his death of some interest in the property; which makes the quantum (however insignificant) of that retained interest an immaterial consideration; and which at the same time excludes from the reach of the tax other transfers in which the interests of the ultimate takers are of precisely the same character would seem to be an illogical rule.

In these circumstances, although the regulations undertake to reconcile all of the decisions on the basis of the reverter principle, we think that *Reinecke* v. *Northern Trust Co.* and *May* v. *Heiner* are fundamentally inconsistent with later decisions of this Court, and should be expressly repudiated if the Court should reach this basic issue.

Question 2

Assuming that, under the applicable state law, there arose, by operation of law, a possible reverter in favor of the settlor's estate, did Section 811 (c) require that the value of the corpus, in view of the record in the case, be included in the settlor's gross estate for federal estate tax purposes?

The answer to this question is "Yes". A possibility of reversion in favor of the grantor's estate is just as effective to support the tax as one arising in favor of the grantor individually (cf. *Fidelity Co.* v. *Rothensies*, 324 U. S. 108; *Chase Nat. Bank* v. *United States*, 116 F. 2d 625 (C. C. A. 2); *Schultz* v. *United States*, 140 F. 2d

945 (C. C. A. 8)), and the revised regulation specifically so provides in Requirement 2, *supra*, p. 16. The reason for this is clear: if, as in the present cases, possession or enjoyment of the remainder interests can be obtained only by beneficiaries who must survive the decedent and if there is a possibility that the property may fall into the grantor's estate, the transfer is just as much a substitute for a testamentary disposition as where there is a possibility that it may revert to the decedent during his lifetime. However, it should not be assumed that the reverter [10] in either of the present cases would operate merely in favor of settlor's estate. For, if our position is correct, there would be a reverter to the settlor himself in each case if all the beneficiaries should predecease him.

Moreover, no distinction should be drawn between a reverter that is expressly reserved and one that arises under applicable state law by reason of the settlor's omission to provide for the disposition of the property in the event that the beneficiaries fail to qualify. The quantum of the settlor's retained rights is identical, whether he reserves the reverter or whether he permits it to arise by operation of state law. The important

[10] Although it is questionable whether the term "reverter" accurately describes the settlor's reversionary interest (see *Helvering* v. *Hallock*, 309 U. S. at 118, fn. 6), we shall adopt that terminology in view of its common usage in this connection.

consideration is not whether he intended to reserve a reverter; it is rather whether he intended the transfer to take effect in possession or enjoyment at or after his death. And where he has made his death the indispensable event upon which the possession or enjoyment of the beneficiaries depends, he has already shown the necessary intent that the transfer take effect in possession or enjoyment at or after his death; the presence of a reverter is merely to meet the requirement of the *Northern Trust* case that decedent retain an interest—we know of no requirement anywhere that the decedent must *intend* to retain such interest.[11]

Nor should any distinction be drawn on the basis of the remoteness of the grantor's reversionary interest. This has been authoritatively settled in *Fidelity Co.* v. *Rothensies,* 324 U. S. 108, 111–112, which is comparable in this respect to the present cases. See also *Commissioner* v. *Estate of Field,* 324 U. S. 113, 116.

[11] We do not mean to suggest that a grantor could not intend to retain a reverter merely by remaining silent as to what should happen to the property in the event that he outlives the beneficiaries. Indeed, undoubtedly one of the basic considerations with respect to resulting trusts and reverters by operation of law is the notion either that such was the grantor's unexpressed intention or that such would have been his intention had he thought about the matter. And we pointed out in our main brief in the *Spiegel* case (pp. 14–15) that such an intent could properly and must necessarily be imputed to the decedent in the light of the facts there presented. This is also true in the *Church* case.

Question 3

Did Section 811 (c) of the Internal Revenue Code, in 1939, require the inclusion in the settlor's gross estate of the value of the corpus of a trust because the settlor, by its terms, had, in 1924, reserved to himself a right to the income of the trust until his death, the reservation thus being made before the March 3, 1931, amendment of that section?

If *Hassett* v. *Welch*, 303 U. S. 303, is to be regarded as correct, the answer to this question is "No."[12] In developing the reasons for this answer, we shall first examine the decision in *Hassett* v. *Welch*, and secondly, we shall then consider whether a different result should be reached under Section 811 (c) of the Internal Revenue Code, adopted in 1939.

(a) *Hassett* v. *Welch* involved a trust executed in 1924 with a life estate reserved in the grantor, who died on November 20, 1932. The Commissioner sought to include the transfer in the gross estate under Section 302 (c) of the Revenue Act of 1926, as amended by the Joint Resolution of March 3, 1931 (c. 454, 46 Stat. 1516) and Section 803 (a) of the Revenue Act of 1932 (c. 209, 47

[12] Of course, this answer is on the assumption that *May* v. *Heiner* is otherwise controlling. If *May* v. *Heiner* is to be regarded as overruled, then the answer to this question is "Yes," and the correctness of *Hassett* v. *Welch* becomes irrelevant. See answer to Question 7, *infra*, pp. 45–48. See also pp. 37–38, *infra*.

Stat. 169). It was provided in Section 302 (h) of the 1926 Act that:

> Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the *transfers, trusts,* estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, *whether made,* created, arising, existing, exercised, or relinquished *before or after the enactment* of this Act. [Italics supplied.]

The provision seemed clear enough. It stated that "except as otherwise specifically provided," transfers referred to in subdivision (c) were covered, whether made before or after the enactment of the statute. Surely, Congress in enacting amendments to Section 302 (c) in 1931 and 1932 must have been aware of Section 302 (h), and would have "otherwise specifically provided" had it so intended. The regulations in effect at the time of the litigation so construed the statute (Regulations 80 (1934 ed.), Article 18 (b), see Appendix, *infra,* p. 61), although it is true that there was a declaration made by the Commissioner several years earlier that he would apply the amendatory provisions prospectively only. T. D. 4314, X–1 Cumulative Bulletin 450.[13] See Appen-

[13] The ruling in T. D. 4314 was incorporated shortly thereafter in Regulations 70. See T. D. 4336, XI–1 Cumulative Bulletin 329.

dix, *infra*, p. 60. But there was no inconsistency between that earlier ruling and the later 1934 regulations as to the *construction* of the statute. The earlier ruling proceeded in full recognition of the language of the statute which included trusts theretofore established, but the Commissioner refrained from giving full effect to the provisions, apparently because of a view that to do so might be unconstitutional under the decisions of this Court.[14]

We think that the Court erred in relying upon the foregoing rulings when it concluded that it should give the plain language of the statute a meaning other than that which appeared on its face; for we think that those rulings supported the application of the statute in those circumstances. Similarly, we think that a careful reexamination of the statements made on the floor of the House, relied upon in the Court's opinion

[14] The Commissioner stated that "*notwithstanding the provisions of section 302 (h)*" he would apply the amendment prospectively only, "in view of" certain decisions of this Court, which ruled primarily upon, or contained implications concerning, the constitutionality of a retroactive application of the statute. T. D. 4314, X–1 Cumulative Bulletin 451. Thus T. D. 4314 recognized that Section 302 (h) made the provisions of Section 302 (c) applicable to transfers made before March 3, 1931, but undertook, merely because of the constitutional doubts of the then officers of the Treasury, to refrain from applying Section 302 (c) retroactively, "notwithstanding the provisions of section 302 (h)." See Appendix, *infra*, p. 60. And the Government's brief in *Hassett* v. *Welch*, pp. 12–33 showed that such constitutional doubts were unfounded.

(303 U. S. at 310), will disclose that they are at least equally consistent with the result then urged by the Commissioner.[15]

However, the Treasury has acceded to the adverse result in *Hassett* v. *Welch*, and its regulations now take that decision into account.[16]

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[15] For example, the Court referred to a statement made by Mr. Garner to the effect that "We did not make it [the joint resolution of March 3, 1931] retroactive * * *." We think that a fair reading of the debates shows, however, that the word "retroactive" was being used in relation to cases in which the grantors had already died. Both the Treasury and Congress were considerably disturbed that the three decisions of March 2, 1931, would result in refunds of some $25,000,000 in taxes already collected. There was some question as to whether Congress would seek to prevent those refunds, and it is persuasive that the word "retroactive" was used in that sense, as will be disclosed by a full reading of the debates. See Cong. Rec., Vol. 74, Part 7, pp. 7078–7079, 7198–7199.

[16] See Regulations 105, Section 81.18:

Sec. 81.18. *Transfers with possession or enjoyment retained.*—Except in the case of a bona fide sale for an adequate and full consideration in money or money's worth, the gross estate embraces (section 811 (c)) all property transferred by the decedent, whether in trust or otherwise, if he retained or reserved the use, possession, right to the income, or other enjoyment of the transferred property, and if the transfer was made—

(1) At any time after 10:30 p. m., eastern standard time, March 3, 1931, and such retention or reservation is for his life, or for such a period as to evidence his intention that it should extend at least for the duration of his life and his death occurs before the expiration of such period; or

(2) At any time after 5 p. m., eastern standard time, June 6, 1932, and such retention or reservation is for any period mentioned in (1) or for any period not ascertainable without reference to his death.

(b) Assuming that *Hassett* v. *Welch* is not to be reexamined, we think that a different result should not be reached by reason of the adoption of the Internal Revenue Code in 1939 and the grantor's death thereafter.

The Code did, of course, reenact (see Appendix, *infra*, pp. 59–60) in Sections 811 (c) and 811 (h) simultaneously, the provisions that were included in Sections 302 (c) and 302 (h) of the Revenue Act of 1926, as amended; and the argument could be made that the difficulties encountered in *Hassett* v. *Welch* are therefore no longer present. Thus, it could be argued that Section 811 (h) governs all transfers covered by Section 811 (c) at the time of its incorporation into the Code.

The difficulty with this argument is that the Code was not intended to make changes of substance, but was "intended to contain all the United States statutes of a general and permanent nature relating exclusively to internal revenue, in force on January 2, 1939 * * *. These statutes are codified without substantive change and with only such change of form as is required by arrangement and consolidation." 53 Stat., Part 1, Preface iii. See also the reports of both the House and Senate committees recommending the adoption of the Code, in each of which it was stated that: "It [the Code] makes no changes in existing law." H. Rep. No. 6, 76th Cong., 1st Sess., p. 3; S. Rep. No. 20, 76th Cong., 1st Sess., p. 1.

Accordingly, if Section 811 (c) of the Code is to be applied to transfers made before March 3, 1931, merely because the settlor had reserved a life interest, the result should be based (subject to the qualification in footnote 12, *supra*, p. 29) upon a rejection of *Hassett* v. *Welch* rather than upon the theory that the adoption of the Code made substantive changes.

Question 4

Were the joint congressional resolution of 1931 (46 Stat. 1516–1517), and subsequent related estate tax statutes, intended to be a repudiation of this Court's May v. *Heiner (281 U. S. 238) interpretation of the estate-tax statutes?*

This question may fairly be answered "Yes". Certainly, the Joint Resolution of March 3, 1931 was regarded as an emphatic disapproval of the results reached in *May* v. *Heiner* and, more particularly, the three *per curiam* decisions, *supra*, p. 13, following *May* v. *Heiner*.

As pointed out above, pp. 5–6, the "possession or enjoyment" clause had appeared in the death tax statutes of at least forty States over a period of nearly a century prior to its inclusion in the first federal estate tax statute in 1916. And every state court that had occasion to construe that clause uniformly treated it as including a transfer in which the transferor had reserved a life in-

terest." Indeed, it was said in *Matter of Keeney*, 194 N. Y. 281, 287:

> It is true that an ingenious mind may devise other means of avoiding an inheritance tax, *but the one commonly used is a transfer with reservation of a life estate.* [Italics supplied.]

The decision was affirmed by this Court on the constitutional issue in *Keeney* v. *New York*, 222 U. S. 525. The regulations of the Treasury Department repeatedly took the same view that transfers with a reserved life interest were covered by the statute. Regulations 37 (editions of

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[17] The state cases are collected in the Government's brief in *Hassett* v. *Welch*, No. 375, 1937 Term, pp. 22–23.

Nor are the state cases to be distinguished, as suggested in the brief of amici curiae herein, p. 7, on the ground that most of them involved legacy or succession taxes rather than estate taxes. It is true that the former impinge on the "receiving" end of the transfer while the latter are imposed on the "giving" end; and it is also true that some important issues may depend upon which kind of death tax is being imposed, such as, where, as between different legatees, the burden of the tax is to fall. *Y. M. C. A.* v. *Davis*, 264 U. S. 47. Cf. *Edwards* v. *Slocum*, 264 U. S. 61; *Stebbins* v. *Riley*, 268 U. S. 137. But the question whether a particular *inter vivos* transfer is a substitute for a testamentary disposition is the same under both types of statutes. Thus, the "contemplation of death" test is the same, regardless of whether the tax is imposed on the giving end or on the receiving end of the transfer. And, as in the case of transfers in contemplation of death, the basic question with respect to the companion clause is whether the transfer accomplishes for the transferor what he might otherwise seek to achieve through a will. Cf. *United States* v. *Wells*, 283 U. S. 102, 116–117.

August 18, 1919, and January, 1921), Article 24;[18] Regulations 63 (1922), Article 20; Regulations 68 (1924), Article 18; Regulations 70 (1926 ed.), Article 18; Regulations 70 (1929 ed.), Article 18. Millions of dollars in taxes were collected by the Bureau of Internal Revenue over a period of about fifteen years, based upon the assumption that the clause was to be so construed. And during that period, Congress reenacted the estate tax in the Revenue Acts of 1918, 1921, 1924, and 1926, each time retaining word for word the clause "intended to take effect in possession or enjoyment at or after his death".

It was not surprising to find, therefore, that Congress was greatly disturbed by the contrary result reached in this Court. We have already referred (*supra*, p. 14) to the remarks of Senator Smoot, Chairman of the Senate Finance Committee, that the decision "came almost like a bombshell, because nobody ever anticipated such a decision." And Congressman Hawley, Chairman of the House Committee on Ways and Means, made the matter equally clear to the House of Representatives, when he said (Cong. Rec., Vol. 74, Part 7, p. 7198):

> It had generally been considered that this provision of the statute covered cases such as those referred to above.

[18] There were two earlier editions of Regulations 37 (October 10, 1916, and May 1917), which, however, were issued in skeleton form, and did not undertake to construe this clause at all.

The form of the Joint Resolution is, we think, not without significance as to the understanding of Congress. For, in providing that transfers with retained life interests were covered by the statute, it did so by adding to the possession or enjoyment clause, the words "*including* a transfer under which the transferor has retained * * *". The use of the word "including" would in itself indicate an intention to make the new provision declaratory of existing law.[19]

Of course, the view that the Joint Resolution was a repudiation of *May* v. *Heiner* would lead to a result that is broadly inconsistent with *Hassett* v. *Welch,* but not strictly so. For all that was actually decided in *Hassett* v. *Welch* was that the new provisions themselves were prospective only. There was no issue raised or decided as to whether the old provision (i. e., the "possession or enjoyment clause" itself) might be regarded as effectively governing such transfers. The issue that was argued and decided in that case presupposed that the new provisions constituted the basis for the imposition of the tax. (For a fur-

[19] To be sure, when the new provisions added by the Joint Resolution were revised in 1932 in the form in which they now appear, the structure of the subsection was changed so as to eliminate the word "including", and to deal separately with transfers involving retained life interests. See Appendix, *infra*, pp. 58–59. However, that change was probably not significant, and was undoubtedly prompted solely by considerations of draftsmanship, since the reserved life estate provisions were expanded and their formulation was facilitated by the revised structure of the subsection.

ther development of this idea, see answer to Question 7, *infra*, pp. 45–48.)

Question 5

Did the May v. *Heiner estate-tax interpretation survive the congressional resolution and this Court's holding and opinion in Helvering* v. *Hallock (309 U. S. 106)?*

The answer to this question is "No". The reasons supporting this answer have already been set forth in large part in the introductory discussion (*supra*, pp. 5–18) and in the answers to Question 1 and Question 4 (*supra*, pp. 18–26, 34–38).

As we have already pointed out, *May* v. *Heiner* was not explicitly overruled by the *Hallock* case. At the same time, we think that the *Hallock* case reflects an interpretation of the statute that is inconsistent wih *May* v. *Heiner*. The essence of the ruling in *May* v. *Heiner*; (see *supra*, pp. 13–14, 22–24) was that the statute did not apply since "title" to this property had been definitely fixed by the trust deed. The same philosophy was the basis for the decisions in the *St. Louis Trust Co.* cases that were overruled by the *Hallock* case.

The opinion in the *Hallock* case indicates at the outset an approach that is at variance with *May* v. *Heiner*. The Court said (309 U. S. at 110–111):

> We must put to one side questions that arise under sections of the estate tax law

> other than § 302 (c)—sections, that is, relating to transfers taking place at death. Section 302 (c) deals with property not technically passing at death but with interests theretofore created. The taxable event is a transfer *inter vivos*. But the measure of the tax is the value of the transferred property at the time when death brings it into enjoyment.

See also *Fidelity Co.* v. *Rothensies,* 324 U. S. 108, 110–111. And the Court in the *Hallock* case expressly referred to *May* v. *Heiner* in terms that certainly do not suggest any continued vitality for that decision (309 U. S. at 120, fn. 7):

> * * * it may be urged with considerable plausibility that in 1931 Congress had in principle already rejected the general attitude underlying the *St. Louis Trust* cases, as illustrated by the fact that in those cases the majority, in part at least, relied upon the Congressionally discarded *May* v. *Heiner* doctrine.

Moreover, the dissenting opinion of Mr. Justice Roberts regarded the decision in *May* v. *Heiner* as "indistinguishable in principle" (309 U. S. at 127) from the *Hallock* case.

Support for the view that the *Hallock* case overruled *May* v. *Heiner* is found in Paul, *Federal Estate and Gift Taxation* (1942), Vol. 1, Sec. 7.15, pp. 337–342; also 1946 Supplement, Sec. 7.15, pp. 144–156. Attention is particularly invited to the last paragraph on page 341 of the 1942 edi-

tion, which reads as follows, exclusive of footnotes:

> The question is whether the *Hallock* decision changed the interpretation of pre-1931 statutory law. This is the question dealt with by the Board in the *Hughes* case. The Supreme Court may well have exercised its right of self-correction in this respect as well as in respect to the "reverter" principle of *Helvering* v. *St. Louis Union Trust Company*. If, as Mr. Justice Roberts intimated in his dissenting opinion in the *Hallock* case, the Supreme Court demolished more of the past than is admitted in the majority opinion, the destruction is justified by the reasoning of that opinion. If the Court can correct one error, it can by the same token correct two.

See note, *Inter Vivos Transfers and the Federal Estate Tax*, 49 Yale L. J. 1118, 1122–1123 (1940). See also Judge Frank's dissenting opinion in *Helvering* v. *Proctor*, 140 F. 2d 87, 89–91 (C. C. A. 2).

Question 6

Under Section 811 (c) is the "possession or enjoyment" of the corpus of an inter vivos trust "intended to take effect * * * at or after" the settlor's death, where he names himself as cotrustee with the broad control and administrative powers over the corpus and income here vested, and where the corpus is withheld from the beneficiaries until the settlor's death?

This question should be answered "Yes", although a contrary result is indicated by *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339.

We have pointed out above that the "possession or enjoyment" clause was intended to reach substitutes for testamentary dispositions; that it does not deal with technical transfers of title, but rather with the postponement of the actual possession or enjoyment of the ultimate taker until at or after the decedent's death; that the decisions of this Court have not been wholly consistent in dealing with this clause; and, in the light of the Court's apparent willingness to examine the problem along fundamental lines, we have suggested that the Court expressly reject those decisions which fail to give effect to the plain language and obvious purpose of this clause. (*Supra*, pp. 5–18, 18–26, 38–40). The circumstances spelled out in Question 6 furnish an additional ground in the present cases for applying the statute here. The fact that the settlor named himself as cotrustee with broad powers of control [20] which were to continue during his lifetime gives emphasis, if further emphasis be

[20] The circumstances that the settlor reserved these powers in his capacity as a cotrustee, as distinguished from some other capacity, should not make any difference. Although it is true that a trustee owes certain fiduciary obligations to the beneficiaries, it is also true that the retained powers may be exercised with his own interest in mind where there is no violation of the beneficiaries' rights. Cf. *Reinecke* v. *Smith*, 289 U. S. 172, 176–177.

needed, to the conclusion that the possession and enjoyment of the beneficiaries was postponed at least until the settlor's death and that the transfers were intended as substitutes for testamentary dispositions.

In the *Spiegel* case, the decedent had named himself and Modie J. Spiegel as trustees. The corpus of the trust originally consisted of shares of stock in Spiegel's House Furnishing Company and in the Spiegel May Stern Company (R. 126). The trustees were given the following powers (R. 126–127):

> 1. The said Trustees, and the survivor of them, or any successor trustee, shall have full, absolute and complete power to hold, manage and control said shares and every part thereof; to sell, exchange, transfer or otherwise dispose of the same, or any part thereof, and to invest and reinvest the proceeds derived from any such sale or sales, or other disposition of said shares, or any part thereof, during the continuance of this trust. While said shares of stock, or any substitutes therefor, are held by said Trustees, or the survivor of them, or any successor Trustee, if any corporation whose stock or other securities are held by said Trustees should require any action of any kind to be taken, said Trustees, and the survivor and any successor trustee, shall have the same right to take any action which may be required of any stockholder or holder of any securities of any such

> corporation as if said Trustees, and the survivor and any successor held such shares or said securities in their own individual names and were the sole owners thereof.

And the trust instrument contained a spendthrift provision preventing the beneficiaries from anticipating any payments to which any of them might be entitled, by any order, assignment or otherwise (R. 87).

In the *Church* case, the settlor named himself and two of his half-brothers (E. Dwight Church and Charles T. Church) as co-trustees with broad powers, including the power in himself to name substitute trustees in the event of a vacancy (R. 5–6). The corpus of the trust consisted of shares of stock in Church & Dwight Co., a closely-held family corporation (R. 8). The controls retained by the settlor in the *Church* case are perhaps even more significant than those in the *Spiegel* case; for they were coupled with a life interest in the settlor, and he retained in his individual capacity the power to veto the sale of the trust assets and to control reinvestments (R. 5). Here, as in the *Spiegel* case, it was clear that none of the remaindermen could have obtained full dominion over the property so long as the settlor lived; and in each case, his death was the indispensable event upon which the actual possession or enjoyment of the ultimate takers depended.

However, as noted above, the *Northern Trust* case rejected as immaterial the settlor's reserved

powers of management. 278 U. S. at 346–347. While we hesitate to suggest that the *Northern Trust* case should be disapproved on this ground alone,[21] we think that this ground, coupled with the general basic considerations discussed above

[21] Only on a few occasions has any attention been paid in the courts to the existence of reserved management controls in relation to the estate tax. In *Commissioner* v. *McCormick*, 43 F. 2d 277 (C. C. A. 7), the court took a more serious view of the significance of such controls. The case involved a transfer in trust with the following features: (1) reservation of income to the settlor; (2) reserved power of revocation with the consent of one of the three principal beneficiaries in the remainder; (3) reversion of the corpus to the settlor if she survived the beneficiaries; and (4) broad powers of management reserved to the settlor. The court, after ruling that the first two considerations could not support the tax, held that the settlor's reversionary interest justified the tax and concluded that the managerial powers were "some evidence of the settlor's intent to postpone the effective date of the beneficiaries' enjoyment and possession of the corpus of the trust estate until after the settlor's death" (p. 280). That decision was reversed in a *per curiam* opinion on the sole authority of *May* v. *Heiner*, without any discussion of this point. *McCormick* v. *Burnet*, 283 U. S. 784.

Schneider v. *Commissioner*, 35 B. T. A. 183, 188–189, is a case in which the settlor's reservation of income and of the right to manage and control certain real estate placed in trust by him was regarded as vital in sustaining the tax.

In *Helvering* v. *Duke*, 290 U. S. 591, the decedent had reserved the right to regain the corpus in the event that he survived the beneficiary, and he also retained wide powers of control as trustee. The Government sought to sustain the tax upon both grounds, and, particularly, made an extensive argument upon the second ground. See Government's brief, No. 25, 1933 Term, p. 23 *et seq.* Since the case was disposed of without opinion by an equally divided Court, it is not clear to what extent any of the four justices voting to sustain the tax were persuaded by that second ground.

may appropriately call for reexamination of that case.

Question 7

In the light of this Court's opinion in Helvering v. Hallock does the Hassett v. Welch (303 U. S. 303) interpretation of the 1931 Congressional resolution have controlling relevance in determining whether the estate tax shall be applied to the Church properties transferred to beneficiaries under a trust created before 1931 but in which Church retained the net income from the trust properties during his life?

The answer to this question is "No". It is assumed that this question presupposes that the rationale of *May* v. *Heiner* is inconsistent with the opinion in *Helvering* v. *Hallock,* at least in the sense that the Court which decided the *Hallock* case would have applied its reasoning to a trust in which the string suspending enjoyment consisted solely of the retention of income for life. It has been argued, however, that the *Hallock* decision, however inconsistent with *May* v. *Heiner,* did not overrule it since otherwise it would also have been compelled to overrule *Hassett* v. *Welch.* See majority opinion in *Helvering v. Proctor,* 140 F. 2d 87, 89 (C. C. A. 2). Phrased another way, this contention is that *Hassett* v. *Welch* construed the Joint Resolution as precluding taxability of such trusts created before its enactment.

This argument was made in *Estate of Hughes* v. *Commissioner,* 44 B. T. A. 1196, and rejected

on the ground that *Hassett* v. *Welch* merely reaffirmed the doctrine of *May* v. *Heiner* as to pre-Resolution transfers and that without *May* v. *Heiner* it has no remaining force (p. 1202). The argument was also rejected by Judge Frank, dissenting in the *Proctor* case. He points out that the parties did not argue the repudiation of *May* v. *Heiner* and confined the issues to the retroactive application of the Joint Resolution. See also *supra*, pp. 37–38. It may be noted that the only method available to Congress to override the result of *May* v. *Heiner* was to use new language. If such language in fact created a new type of liability it was arguable that its retroactive application might be unconstitutional, and, therefore, that the new provision was to be applied prospectively only.[22] This, however, does not preclude

[22] Indeed, the fear of unconstitutionality appears to be the consideration that originally led to the Treasury ruling that the Joint Resolution would be applied prospectively only, "notwithstanding" the provisions of the statute which seemed to require a retrospective operation. See T. D. 4314, X-1 Cum. Bull. 450, discussed, *supra*, pp. 30–31. Of course, even the retrospective operation would have been such in a limited sense only; for it would have been retrospective only in the sense that the transfer had been executed previously. But decisions such as *Nichols* v. *Coolidge*, 274 U. S. 531, and *Coolidge* v. *Long*, 282 U. S. 582, indicated a rather inhospitable approach to such constitutional issues in death tax cases at that time (cf. also *Heiner* v. *Donnan*, 285 U. S. 312), and it was that reason, rather than a requirement of the statute itself that undoubtedly accounted for the Treasury's original determination not to press its application to transfers made prior to the Joint Resolution.

a reconsideration of the scope of the original statute even though an overlapping might thereby result.

The point is discussed in Paul, *Federal Estate and Gift Taxation,* Vol. 1, p. 341, where it is stated:

> Congress in the Joint Resolution dealt with a situation created by a Supreme Court decision, and expressed partial disapproval of the decision by amending the statute to do away with the effect of the decision *for the future:* It did nothing more as to the past than leave the statute as it was. The determination of legislative intent in the previous law passed by another Congress was not within the jurisdiction of the Seventy-second Congress, but rather of the courts. The Seventy-second Congress might, of course, have enacted a statute covering the law of the past, but it did not attempt to do so. This failure to deal with the law of the past may even have been induced by a misconception of previous law fostered by the Supreme Court of 1930 and 1931. But it is nevertheless inaction as to the past, and the Joint Resolution left pre-1931 law untouched and unchanged.

A parallel situation is provided by the amendments to what is now Section 811 (d) made by Section 805 of the Revenue Act of 1936, c. 690, 49 Stat. 1648, which were occasioned by the decision of *White* v. *Poor,* 296 U. S. 98. Section 811 (d) (1), applicable to transfers made after June 22,

1936, expressly includes in gross estate transfers subject to a power to "alter, amend, revoke, or terminate". Section 811 (d) (2), applicable to transfers on or before June 22, 1936, omits the word "terminate". Prior to the amendment it was uncertain whether a power to terminate was included within the power to "alter, amend, or revoke". Although Congress stated that the amendment inserting the word "terminate" was only declaratory of prior law (H. Rep. No. 2818, 74th Cong., 2d Sess., p. 10) the new express provision was still given only prospective application because of a desire not to impose tax on prior transfers not compelled by prior law. This Court nonetheless held in *Commissioner* v. *Estate of Holmes,* 326 U. S. 480, that a power to "alter, amend, or revoke" included a power to terminate so that the transfer was taxable even though made prior to the 1936 legislation. It is believed that a similar holding should be made with respect to the Joint Resolution. If the Resolution was necessary for the taxing of transfers with income reserved, *Hassett* v. *Welch* determined its prospective application. The decision should not, however, be considered as "freezing" the construction of the possession or enjoyment clause.

Question 8

Assuming that under the "refined technicalities of the law of property" the "possession or enjoyment" of the trust properties here be

deemed to have passed to the beneficiaries when the trust was created, are the transfers so much "akin to testamentary dispositions" as to make them subject to the estate tax statutes? (See Helvering v. Hallock, p. 112.)

The answer to this question is "Yes". The phrase "possession or enjoyment" is not used in Section 811 (c) of the Code or in comparable sections of earlier estate tax statutes according to the "refined technicalities of the law of property". See *Helvering* v. *Hallock,* pp. 112, 118. Hence whether possession and enjoyment might be deemed to have passed under the refined technicalities of the local property law to the beneficiaries when the respective trusts were created is an immaterial consideration. Cf. *United States* v. *Pelzer,* 312 U. S. 399, 402–403.

We have shown in our discussion of earlier questions that transfers "intended to take effect in possession or enjoyment" at or after the decedent's death were by nature substitutes for or akin to testamentary dispositions; that the classification of them by Congress in the same category with transfers "in contemplation of death" clearly indicated a purpose on the part of Congress to include such transfers in the decedent's gross estate whether or not anything "passed" in a technical sense from decedent at his death; and that where possession and enjoyment are actually retained by the decedent until his death or the

decedent's death determines the time and right to actual possession or enjoyment by some other person, then the very nature of the transfer shows it to have been intended to take effect in possession or enjoyment at or after the decedent's death within the meaning of the statute. The constitutional validity of a provision requiring the inclusion in the gross estate of such transfer is no longer open to serious question. See *Fernandez* v. *Wiener*, 326 U. S. 340; *Helvering* v. *Bullard*, 303 U. S. 297; *Tyler* v. *United States*, 281 U. S. 497; *Milliken* v. *United States*, 283 U. S. 15.

A transfer, as in the *Church* case, with reservation of income, accomplishes every purpose of a will except that it deprives the donor of the power to make further disposition of his property between the time of the transfer and his death. The donor, like the testator, continues in possession or enjoyment until death and no beneficiary obtains full dominion until that time. In addition, in the *Church* trust the interest of each beneficiary was defeasible if he predeceased the donor so that he did not even have a readily salable remainder. This is true whenever death determines the choice of beneficiaries even though the donor retains no reverter. That the *Church* transfer was motivated by the same considerations as lead to testamentary dispositions of property and was truly a substitute for or akin

to a testamentary disposition is further confirmed by the indenture itself. At the time of the transfer Church was 21 years of age, was unmarried and had no lawful issue. Nevertheless the indenture provided (R. 4):

> Whereas the said Francois L. Church is desirous of making provision for any lawful issue which he may leave at the time of his death as well as provide an income for himself for life in the manner hereinafter set forth.

In the *Spiegel* case the beneficiaries of the remainder interests could not obtain possession or full dominion until the death of the decedent, and they had to survive the decedent in order to obtain the property. It is precisely in such circumstances as these that the statute undertakes to impose the tax, and insofar as any remainder beneficiary is concerned his position is similar to that of a legatee of a will whose legacy might lapse by his death prior to that of the testator. In the light of the *Hallock* decision, the principle seems to be well established that the application of the statute is not necessarily based upon the termination of the donor's enjoyment. It applies regardless of the disposition of the income if the interest of the remainderman is conditioned upon his survival of the donor. But if the *Hallock* trusts were "testamentary in effect" although the income was at all times payable to

the beneficiary,[23] the *Spiegel* transfer becomes distinguishable only because of the remoteness or absence of the reversionary interest. The statute, however, was never intended to turn upon these differences in degree. (Cf. *Fidelity Co.* v. *Rothensies,* 324 U. S. 108, 111–112; *Commissioner* v. *Estate of Field,* 324 U. S. 113, 116.) The statute is phrased in terms of the postponement at least until the donor's death of the possession and enjoyment of the ultimate beneficiary and since such postponement in the *Spiegel* case operated in similar manner as in the *Hallock* case, it is, we believe, within the principle of that decision.

Question 9

What is the effect of the rulings of Helvering v. Clifford (309 U. S. 331) upon these trusts?

This question appears to be closely related to Question 6, and we refer the Court to our answer to that question in this connection.

Strictly speaking, the *Clifford* case has no necessary effect upon the applicability of the possession or enjoyment clause of Section 811 (c) to these trusts. However, if the *Clifford* case did apply to any trust, it would be strongly persuasive

[23] Of course, the outstanding income interest was excluded in the *Hallock* case, whereas there were no outstanding income interests in the instant cases that were unaffected by the decedent's death. See *Fidelity Co.* v. *Rothensies,* 324 U. S. 108, 113.

that the transfer was covered by that clause; for the *Clifford* case held that a settlor was taxable upon income that was not in fact payable to him, on the ground that he had retained so many attributes of ownership as to justify the conclusion that he continued to be the owner of the trust property. In such circumstances, it would be but a short step to conclude that the transfer was not intended to take effect in possession or enjoyment in the hands of the beneficiaries until the termination of the settlor's interest and dominion.[24]

Considering this concept in relation to the *Church* case, it is at once apparent that a far stronger situation is presented here for the application of the possession or enjoyment clause. For the settlor of a trust governed by the *Clifford* case is charged with income that he in fact has not received; whereas the settlor in the *Church* case explicitly reserved the income to himself.

[24] Indeed, it is even arguable that a trust covered by the *Clifford* doctrine should be included in the gross estate under Section 811 (a), which in a sense corresponds to the general provisions in Section 22 (a) defining gross income. Section 811 (a) is the basic provision requiring the inclusion in the gross estate of all property owned by the decedent at his death. And where the settlor remains in substance the owner of the trust property for purposes of Section 22 (a) under the *Clifford* case, it is highly persuasive that it should be included in his gross estate under Section 811 (a), unless there is a specific statute providing otherwise. See *Helvering* v. *Safe Deposit Co.*, 316 U. S. 56, 58–59. However, the Government has sought in the present cases merely to include these trusts in Section 811 (c).

He may thus be regarded all the more as withholding the possession or enjoyment of the property from the other beneficiaries during his lifetime, when he reserves to himself the actual fruits of the property in addition to a measure of control over the corpus. And it is certainly arguable that the retention of such control is sufficient to distinguish the case from *May* v. *Heiner*.

In the *Spiegel* case, on the other hand, the settlor did not reserve the income to himself, and it is improbable that the income would be charged to him under the doctrine of the *Clifford* case. See Section 29.22 (a)–21 (e) of Regulations 111, as amended by T. D. 5567, 1947–2 Cum. Bull. 9, 12. It does not follow, however, that because the income would not be taxable to the settlor the corpus cannot be included in his gross estate. The suspension of the enjoyment of the corpus until death, although of no necessary significance for income tax purposes, is so important for the possession or enjoyment clause of the estate tax statute that the retention of far less in the way of administrative control (if the retention of any such control be required) over the corpus should be sufficient for estate tax purposes than is necessary for income tax purposes under the *Clifford* doctrine. However, we do not mean to suggest that the settlor in the *Spiegel* case did not retain substantial powers, and we refer the Court to our answer to Question 6 for a discussion of that phase of the case.

CONCLUSION

Although the decisions of this Court with respect to the basic issues in these cases are extremely difficult to reconcile with one another, the Treasury has tried to harmonize them, and the result of that endeavor is reflected in comprehensive regulations covering this field. We now renew the contention made when these cases were first submitted, that these regulations are valid and that both cases are covered by the regulations.

On the other hand, if the Court desires to analyze the problem on a more basic level, as indicated by the questions raised in the order for reargument, we submit that cases such as *May* v. *Heiner* and *Reinecke* v. *Northern Trust Co.* should be explicitly overruled. Such a disposition of these cases would produce a more consistent body of law, in consonance with both the plain language and obvious purpose of the statute. The result would be a sounder administration of the estate tax law in which taxability would not be made to rest upon such tenuous grounds as are now determinative under the decisions.

In either event, the judgment of the Court of Appeals in the *Spiegel* case, No. 3, should be affirmed, and the judgment of the Court of Ap-

peals in the *Church* case, No. 5, should be reversed.

Respectfully submitted.

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APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9 [as originally enacted]:

SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *

* * * * *

(h) Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act.

* * * * *

Joint Resolution of March 3, 1931, c. 454, 46 Stat. 1516 [Italics added to indicate new language]:

* * * That the first sentence of subdivision (c) of section 302 of the Revenue Act of 1926 is amended to read as follows:

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom;* except in case of a bona fide sale for an adequate and full consideration in money or money's worth."

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 803. FUTURE INTERESTS.

(a) Section 302 (c) of the Revenue Act of 1926, as amended by the Joint Resolution of March 3, 1931, is amended to read as follows:

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons

who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *

Internal Revenue Code:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

(a) *Decedent's Interest.*—To the extent of the interest therein of the decedent at the time of his death;

* * * * *

(c) *Transfers in Contemplation of, or Taking Effect at Death.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * * *

* * * * *

(h) *Prior Interests.*—Except as otherwise specifically provided therein, subsections (b), (c), (d), (e), (f), and (g) shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after February 26, 1926.

T. D. 4314, X-1 Cum. Bull. 450 (1931):

Section 302 (c) of the Revenue Act of 1926 was amended by a joint resolution (Pub. 131), approved 10.30 p. m., Washington, D. C., time, March 3, 1931, to read as follows (the portion added by the amendment is in italic):

* * * * *

In view of the decisions of the Supreme Court of the United States in *Nichols* v. *Coolidge* (274 U. S., 531 [T. D. 4072, C. B. VI-2, 351]), *May* v. *Heiner* (281 U. S., 238 [Ct. D. 186, C. B. IX-1, 382]), *Coolidge* v. *Long* (282 U. S., 582), *Burnet* v. *Northern Trust Co.* (51 S. Ct., 342), *Edgar M. Morsman, jr.,* v. *Lurnet* (51 S. Ct., 343) and *Cyrus H. McCormick* v. *Burnet* (51 S. Ct., 343), the portion added by the amendment to section 302 (c) of the Revenue Act of 1926, as set forth above in italic, will, notwithstanding the provisions of section 302 (h) of that Act, be applied *prospectively* only, i. e., to such transfers coming within the amendment as were made *after* 10.30 p. m., Washington, D. C., time, March 3, 1931.

Regulations 70, 1929 edition, will be amended to make the changes necessitated by the amendment to section 302 (c) of the Revenue Act of 1926 and the above decisions of the Supreme Court.

Treasury Regulations 80 (1934 ed.):

Art. 18. *Transfers with possession or enjoyment retained.*—(*a*) *Tranfers included.*—The statutory phrase, "a transfer * * * intended to take effect in possession or enjoyment at or after his death," includes a transfer, whether in trust or otherwise, made subject to the reservation by the decedent of the use, or the possession, or the rents or other income of the transferred property, or any part thereof, for his life, or for a period ascertainable only by reference to his death, or for a period of such duration as to evidence his intention to retain the enjoyment (in whole or in part) of the transferred property throughout his life. (See article 15.)

(*b*) *Taxability.*—Every such transfer (not amounting to a bona fide sale for an adequate and full consideration in money or money's worth), made by the decedent subsequent to September 8, 1916, is taxable, and the value of the property or interest so transferred shall be included in the gross estate of the decedent. The provisions of this subdivision do not apply (1) if the transfer was made prior to 10.30 p. m., eastern standard time, March 3, 1931, and (2) if the decedent died prior to 5 p. m., eastern standard time, June 6, 1932. See section 506 of the Revenue Act of 1934.

Treasury Regulations 80 (1937 ed.) [as amended by T. D. 5008, 1940–2 Cum. Bull. 286]:

Art. 17. *Transfers conditioned upon survivorship.*—The statutory phrase, "a transfer * * * intended to take effect in possession or enjoyment at or after his death," includes a transfer by the decedent prior to his death (other than a bona fide sale for an adequate and full considera-

tion in money or money's worth) whereby and to the extent that the beneficial title to the property transferred (if the transfer was in trust), or the legal title thereto (if the transfer was otherwise than in trust), is not to pass from the decedent to the donee unless the decedent dies before the donee or another person, or its passing is otherwise conditioned upon decedent's death; or, if title passed to the donee, it is to be defeated and the property is to revert to the decedent as his own should he survive the donee or another person, or the reverting of the property to the decedent is conditioned upon some other contingency terminable by his death. *Since in such transfers the decedent's death is requisite to a termination of his interest in the property, it is unimportant whether his interest be denominated a reversion or a possibility of reverter, whether it arose by implication of law or by the express terms of the instrument of transfer,* and whether the interest of the donee be contingent or vested subject to be divested, and the tax will apply, unless otherwise provided in the next succeeding paragraph, *without regard to the time when the transfer was made,* whether before or after the enactment of the Revenue Act of 1916. Thus, upon a transfer by a decedent of property in which an estate for life is given to one and an estate in remainder to another, but with a provision added that the estate in remainder shall revest in the decedent should he survive the owner of the life estate, there is to be included, in determining the value of the decedent's gross estate following his death, the value as of the date of his death of the estate in remainder, if the life estate is then outstanding. The

value of the outstanding life estate is not to be included in determining the value of the gross estate, unless that estate had been transferred in contemplation of the decedent's death, or otherwise as to render it a part of the gross estate. If by reason of an election by the executor the valuation of the gross estate is governed by the provisions of article 11, adjustments in the values of such transferred estates may be required. (See article 15.)

Where the transfer was made during the period between November 11, 1935 (that being the date upon which the Supreme Court of the United States rendered its decisions in the cases of *Helvering* v. *St. Louis Union Trust Co.* (296 U. S., 39 [Ct. D. 1047, C. B. XIV–2, 339 (1935)]) and *Becker* v. *St. Louis Union Trust Co.* (296 U. S., 48 [Ct. D. 1046, C. B. XIV–2, 337 (1935)]) and January 29, 1940 (that being the date upon which such Court rendered its decisions in *Helvering* v. *Hallock* and companion cases (309 U. S. 106 [Ct. D. 1440, C. B. 1940–1, 223]), and the Commissioner, whose determination therein shall be conclusive, determines that such transfer is classifiable with the transfers involved in such two cases decided on November 11, 1935, rather than with the transfer involved in the case of *Klein* v. *United States* (283 U. S., 231 [Ct. D. 333, C. B. X–1, 462 (1931)]), previously decided by such Court, then the property so transferred shall not be included in the decedent's gross estate under the provisions of this article, if the following condition is also met: Such transfer shall have been finally treated for all gift tax purposes, both as to the calendar year of such transfer and subsequent calendar years, as a

gift in an amount measured by the value of the property undiminished by reason of a provision in the instrument of transfer by which the property, in whole or in part, is to revert to the decedent should he survive the donee or another person, or the reverting thereof is conditioned upon some other contingency terminable by decedent's death. [Italics supplied.]

Treasury Regulations 105, promulgated under the Estate Tax Provisions of the Internal Revenue Code:

SEC. 81.17 [as amended by T. D. 5512, 1946–1 Cum. Bull. 264] *Transfers Intended to Take Effect at or After the Decedent's Death.*—A transfer of an interest in property by the decedent during his life (other than a *bona fide* sale for an adequate and full consideration in money or money's worth) is "intended to take effect in possession or enjoyment at or after his death," and hence the value of such property interest is includible in his gross estate, if—

(1) possession or enjoyment of the transferred interest can be obtained only by beneficiaries who must survive the decedent, and

(2) the decedent or his estate possesses any right or interest in the property (whether arising by the express terms of the instrument of transfer or otherwise).

The decedent shall not be deemed to possess a right or interest in the property if his right or interest consists solely of an estate for his life. (For regulations concerning the separate provision of the statute dealing directly with the case of a life estate retained in property transferred by the decedent, see section 81.18.) Where possession or enjoyment of the transferred

interest can be obtained by beneficiaries either by surviving the decedent or through the occurrence of some other event or through the exercise of a power, subparagraph (1) shall not be considered as satisfied unless, from a consideration of the terms and circumstances of the transfer as a whole, the power or event is deemed to be unreal, in which case such event or power shall be disregarded. Except as provided in the last paragraph of this section, the value of the property so transferred is includible without regard to the date when the transfer was made, whether before or after the enactment of the Revenue Act of 1916.

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Example (5). The decedent transferred property in trust retaining a life estate and giving a succeeding life estate to another, with the remainder to such succeeding life tenant's issue who survived both the decedent and the life tenant. The decedent also retained the power to designate who shall take the remainder in case the succeeding life tenant died without surviving issue. Here, possession or enjoyment of the property can be obtained by the succeeding life tenant and by the succeeding life tenant's issue only if they survive the decedent; thus satisfying requirement (1). Requirement (2) is also satisfied with respect to the interests of both beneficiaries since the decedent retained a right in the entire property, i. e., a contingent power of appointment. The entire value of the property, including the value of the succeeding life estate and the remainder is, therefore, includible in the decedent's gross estate.

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Example (7). The decedent transferred property in trust to pay the income to his son during decedent's life, and at decedent's death to pay the principal to his son if living; if not, to his son's issue surviving both the son and the decedent. In this case, the property may revert to the estate of the decedent if neither his son nor his son's issue survives him. Moreover, neither the son nor the latter's issue can obtain possession or enjoyment of the property unless they survive the decedent. The entire value of the estate in remainder is, therefore, includible in the latter's gross estate.

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SEC. 81.18. *Transfers with possession or enjoyment retained.*—Except in the case of a bona fide sale for an adequate and full consideration in money or money's worth, the gross estate embraces (section 811 (c)) all property transferred by the decedent, whether in trust or otherwise, if he retained or reserved the use, possession, right to the income, or other enjoyment of the transferred property, and if the transfer was made—

(1) At any time after 10:30 p. m., eastern standard time, March 3, 1931, and such retention or reservation is for his life, or for such a period as to evidence his intention that it should extend at least for the duration of his life and his death occurs before the expiration of such period; or

(2) At any time after 5 p. m., eastern standard time, June 6, 1932, and such retention or reservation is for any period mentioned in (1) or for any period not ascertainable without reference to his death.

A reservation for a "period not ascertainable without reference to his death" may be illustrated by a reservation of the right to receive, in quarterly payments, the income of the transferred property where none of the income between the last quarterly payment and decedent's death was to be received by him or his estate; or by a reservation of a life estate following a precedent estate for life or a term of years.

The use, possession, right to the income, or other enjoyment of the property will be considered as having been retained by or reserved to the decedent to the extent that during any such period it is to be applied towards the discharge of a legal obligation of the decedent, or otherwise for his pecuniary benefit.

If such retention or reservation is of a part only of the use, possession, income, or other enjoyment of the property, then only a corresponding proportion of the value of the property should be included in determining the value of the gross estate.

(See section 81.15.)

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